IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH

S.B. ARBITRATION APPLICATION NO.38/07

M/s. Sarvoday Construction

Versus

State & Anr.

DATE OF ORDER :: 07/12/2007

HON'BLE MR. JUSTICE AJAY RASTOGI

Mr. S.C. Mittal, for applicant

Mr. Arun Sharma, Dy.G.A.

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Instant application has been filed u/s.11 of Arbitration and Conciliation Act, 1996 for appointment of Arbitrator.

Petitioner entered into agreement with the respondents for construction of missing link road from Faliya to Bapcha km. 7/500 to 16/700. Certain dispute arose under the agreement. Petitioner served notice for referring the matter to the Arbitrator under Clause 23 dated 21st March, 2007 which was served in the office of respondents on 23rd March, 2007. The disputed claim amount, which according to applicant, is for a sum of Rs.8,56,511.72 and along with notice a Demand Draft of 2% of the disputed amount of Rs.17,135/ was also paid.

Instant application was filed before this court on 28th April, 2007 and notices were issued

to the respondents on 11th May, 2007. From the correspondence which has been placed on record matter was referred to the Standing Committee on or after 5th June, 2007.

Respondents have filed reply and raised objection that present application has been filed without any authority from the firm and no Power of Attorney Holder has been placed on record. As such, application is not competent to be entertained. He further submits that 2% of the disputed amount was not deposited along with notice, as such, there was no occasion for the respondents to appoint or refer the matter to the Arbitrator under Clause 23 of the agreement. Counsel further submits that once the matter has now been referred to the Standing Committee, may be after notices were issued by this court, applicant can appear and submit his claim before the Committee to whom the matter has now been referred by the respondents.

So far as objection with regard to filing of present application is concerned, it is not disputed that agreement was entered between applicant firm and respondents and the instant application has been filed by proprietorship firm through its authorized representative Shri Govind Prasad Sharma as Power of Attorney Holder of Proprietorship Firm with whom respondents entered into agreement.

In opinion of this court, the application cannot be said to be incompetent and the objection raised by respondents stands overruled.

So far as depositing of 2% of the disputed amount is concerned, applicant has a disputed claim of Rs.8,56,511.72 and accordingly, 2% has been deposited.

So far as reference of refund of security deposit is concerned, it will be due after 5 years as per Clause 37(d) of the agreement. As such, there is no dispute which is to be examined.

The apex court in **Datar Switchgears Ltd. Vs. Tata Finance Ltd. [(2000) 8 SCC-151]** observed as under:

> “So far as cases falling under Section 11(6) are concerned -- such as the one before us -- no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically

> forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6),if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited."

In view of the judgment of apex court [supra], once the respondents have failed to make appointment of Arbitrator under Clause 23 of agreement within 30 days or till the applicant approaches this court, their right of making appointment of Arbitrator stands forfeited and Chief Justice or his designated Judge alone holds competence to appoint Arbitrator u/s.11(6) of the Act.

In view of judgment of apex court [supra], right of appointment of Arbitrator under Clause 23 available with the respondents stands forfeited and reference made to the Standing Committee under Clause 23 of the agreement is without jurisdiction and is hereby set aside.

In the facts and circumstances of the case, I consider it proper to appoint Hon'ble Mr. Justice A.C. Goyal [Retd.], D-19-B, “Seema Sadan”, Meera Marg, Bani Park, Jaipur as sole Arbitrator to whom the dispute shall be referred. Remuneration of Rs.50,000/- & Rs.10,000/- towards expenses [to be equally shared] shall be paid to the sole Arbitrator by the parties.

With the above observations, the application stands disposed of. Copy of this order be sent to Hon'ble Mr. Justice A.C. Goyal [Retd.], D-19-B, “Seema Sadan”, Meera Marg, Bani Park, Jaipur, Arbitrator forthwith and parties are directed to appear before him on 19th January, 2008 at 4.30 PM or any other date if informed by him.

[AJAY RASTOGI],J.